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UNCLAS SECTION 01 OF 02 HONG KONG 001779

SIPDIS

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STATE FOR EB/TPP/MTA/IPC/FELSING
STATE FOR EB/IPE
STATE FOR EAP/CM
STATE FOR INR/EAP
NSC FOR DWILDER, KTONG
DEPT PASS USTR FOR SMCCOY, ACELICO, RBAE
DEPT PASS TO USPTO FOR TBROWNING, CWONG
BEIJING FOR COHEN

E.O. 12958: N/A

TAGS: [CH](#) [ECON](#) [ETRD](#) [HK](#) [KIPR](#) [KJUST](#) [PINR](#) [PGOV](#)

SUBJECT: SENIOR IPR ATTACHE MARK COHEN DISCUSSES PRC AND
HONG KONG IP ISSUES WITH LOCAL GOVERNMENT AND STAKEHOLDERS

REF: HONG KONG 1363

¶1. (SBU) Summary: Legislative Councilor Sin Chung Kai told visiting Beijing Intellectual Property Senior Attache Mark Cohen and ConGen Hong Kong staff that Hong Kong's amended copyright law should generally please copyright owners, including U.S. companies, although he noted that a statutory "fair use" provision will have to be strengthened later. The recent decision by the Court of Final Appeal to uphold the conviction of a Hong Kong resident for illegally uploading copyrighted material using BitTorrent software should lead to increased enforcement activities against infringement using Peer-to-Peer (P2P) software, he added.

¶2. (SBU) In a subsequent meeting with the Hong Kong Customs and Excise Department (CED), Hong Kong government (HKG) officials offered mixed responses on Hong Kong's legal status regarding accession to the WIPO Internet Treaties (WIPO Treaties). All agreed that Hong Kong's copyright laws already met most of the requirements of WIPO Treaties provisions. CED's Intellectual Property Investigation Bureau actively conducts enforcement against trade fair violations. Cooperation with mainland customs officials is frequent, although less regular with mainland police. Cohen also discussed mainland IP issues with AmCham Hong Kong's IP committee and with a group of international IP lawyers based in Hong Kong. END SUMMARY.

Legco and the Copyright Amendment

¶3. (SBU) On June 13, ConGen Hong Kong staff and Embassy Beijing Intellectual Property Senior Attache Mark Cohen met with Legislative Councilor and Democratic Party Vice Chair Sin Chung Kai, who represents the functional constituency for the Information Technology sector. Sin told Cohen that the government yielded to some stakeholder concerns, including director's liability for software infringement. As for publishers, the amendment introduces a "fair use" concept for textbooks. However, this clause remains controversial for stakeholders who argue it is too broad. Sin noted that this provision will likely require further subsidiary legislation.

¶4. (SBU) NOTE: The copyright Amendment was passed on June 27. The government yielded to stakeholder concerns on the

circumvention of technical prevention measures and reached a compromise with industry on parallel imports. Although included in the amendment, the director's liability clause is weaker than what American stakeholders had hoped. While it does make company directors liable for infringement in the workplace, it also provides an employee defense, which potentially could be used by directors to relieve themselves of liability. Furthermore, this clause will not come into effect for approximately six to twelve months, pending a HKG education campaign to warn companies of the new law.

Nonetheless, BSA and Microsoft officials expressed satisfaction that some form of director's liability is now law. Regarding fair use, publishers remain concerned that the new law is too broad and does not protect rights holders from infringement by for-profit educational institutions (of which there are many in Hong Kong.) The HKG responds that its fair use provision is based on U.S. copyright law.

¶15. (SBU) Sin also stated that Hong Kong amended its copyright laws between 1995-1997 to comply with TRIPS and WIPO treaties. Hong Kong already complies with 95% of WIPO rules with the sole exceptions being provisions on public performance rights and moral rights. Cohen encouraged the HKG to complete remaining legislative formalities. Regarding BitTorrent and P2P file sharing, Sin predicted that CED would escalate enforcement operations against this form of infringement. He noted that CED largely waited until the Court made its final verdict in the case and now is empowered to take more proactive action.

Customs and Excise Department

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¶16. (SBU) Cohen and ConGen staff discussed enforcement activity with CED Intellectual Property Investigation Bureau Superintendent Jim Kwok, Divisional Commander Le Kam-kuen, Group Head Edmond Cheng, and Senior Investigator Simon Ng. Kwok said CED closely monitors trade exhibits for IPR violations. Last year, CED intervened in three or four cases for IPR violations at trade shows. Cohen responded that the Commerce Department has a world-wide trade fair enforcement initiative and requested further information on Hong Kong's practices. Regarding handling of infringing materials after enforcement activities, CED destroys both counterfeit items and production lines after successful raids. Typical violations involve watches, handbags, and garments. Internet piracy is growing as well.

¶17. (SBU) CED has fast action plans for enforcement and accepts affidavits for copyright registration without a requirement for personal presence. In such instances, a U.S. copyright certificate could be used to demonstrate ownership of copyright. Kwok said civil IP complaints can be filed online, while criminal complaints require that the owner's representative be in Hong Kong. Bonds are not required, although evidence is.

¶18. (SBU) Kwok added that CED's IP Investigation Bureau has 200 staff and that they regularly exchange information with PRC customs authorities, noting many successful joint seizures with the mainland. Coordination with mainland police, however, is infrequent. Nonetheless, Kwok added that frequent information exchange -- including real time exchange -- between HKG and PRC officials allows Hong Kong to monitor piracy in the Mainland, especially in Guangdong. Cooperation on internet related cases remains limited, however. Regarding education in Hong Kong, the HKG's youth ambassador projects resulted in thousands of reports of IPR violations. CED works with education officials on creating primary and secondary school programs to build awareness of IPR.

AmCham and other stakeholders

19. (SBU) Cohen attended the monthly meeting of the American Chamber of Commerce's IP Committee. He provided committee members with an overview of the recent WTO case that the U.S. filed concerning IP in China, noting that the case should not be taken as an attack against China. However, he stated that China reacted by suspending formal cooperation on IP matters with the U.S., including putting off the Joint Commission on Commerce and Trade (JCCT) and suspending cooperation with the EU and Japan. (Note: The EU, Japan and Mexico joined the U.S. as "observers" in the case.) In response to a question on IPR enforcement in China, Cohen suggested it was important not to misallocate resources and that foreign companies, including their counsel in Hong Kong, should encourage spending on deterrent remedies. He told the committee that using foreign lawyers to pursue administrative or trade fair remedies is often quite expensive with minimum deterrent effect.

Cunningham